

**U.S. Department of Labor**

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**Issue Date: 29 April 2003**

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In the Matter of

**WILLIAM J. LITTLE**

Claimant

Case No.: 2001 LHC 2935

v.

**BATH IRON WORKS**

Employer

OWCP No.: 01-152334

and

**DIRECTOR, OFFICE OF WORKERS'  
COMPENSATION PROGRAMS**

Party in Interest

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Appearances:

Ms. Marcia J. Cleveland, Attorney  
For the Claimant

Mr. Stephen Hessert, Attorney  
For the Employer

Before:

Richard T. Stansell-Gamm  
Administrative Law Judge

**DECISION AND ORDER -  
AWARD OF TEMPORARY & PERMANENT PARTIAL DISABILITY  
COMPENSATION  
AWARD OF MEDICAL BENEFITS**

This case involves a claim filed by Mr. William J. Little for benefits and medical benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901 - 950, as amended ("the Act"). The claim stems from an alleged environmental sensitivity developed over the course of his employment with Bath Iron Works ("BIW").

On August 8, 2001, the District Director forwarded to the Office of Administrative Law Judges the pre-hearing statement filed by the Claimant's counsel. Pursuant to a Notice of Hearing,

dated November 14, 2001 (ALJ I),<sup>1</sup> I conducted a formal hearing on March 14, 2002 in Portland, Maine, attended by Mr. Little, Ms. Cleveland, and Mr. Hessert. My decision in this case is based on the testimony presented at the hearing and all the documents admitted into evidence: CX 1 to CX 14 and EX 1 to EX 22.<sup>2</sup>

### **Issues**

1. Causation.
2. Occupational disease or injury.
3. Nature and extent of disability and corresponding compensation.
4. Medical benefits.

### **Parties' Positions**

#### Claimant<sup>3</sup>

Mr. Little started working at BIW in 1990 and from 1991 through 2001, he worked as a welder. In that capacity, he spent a substantial portion of his time welding painted surfaces and being exposed to welding smoke and fumes. Even though Mr. Little used a respirator during the welding process, he remained exposed to the fumes during other times of his work day. From 1991, Mr. Little reported to the BIW Health Department his adverse reactions to the welding fumes, which included nausea and dizziness. Over the course of his employment, Mr. Little's symptoms became more intense. By the time he left BIW, Mr. Little was having trouble working the last work day of each week. Finally, due to his inability to tolerate this exposure, he left BIW on April 10, 2001. Since his departure from BIW, his symptoms have declined.

Dr. Kern, Mr. Little's treating physician, diagnosed odor intolerance that was work-related. His condition is not a pulmonary problem. Instead, Mr. Little's odor intolerance is based on his exposure to the welding odors and not any specific toxic levels. The physician placed Mr. Little at

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<sup>1</sup> The following notations appear in this decision to identify specific evidence and other documents: ALJ - Administrative Law Judge exhibit, CX - Claimant exhibit, EX - Employer exhibit, and TR - Transcript of hearing.

<sup>2</sup>As permitted in the hearing (TR, pages 10, 21, 31 and 32), I received post-hearing Dr. Bokinsky's June 21, 2002 deposition. Absent any post-hearing objection, I now admit the deposition as EX 22 into evidence. I also provided Ms. Cleveland an opportunity to have Mr. Little address additional job opportunities (TR, page 101). To date, and consistent with her doubt that she would provide any additional information (TR, page 116), I received nothing from Ms. Cleveland concerning Mr. Little's response.

<sup>3</sup>Post-hearing brief, dated July 15, 2002, and hearing presentation (TR, pages 5 to 8, 14, and 19).

maximum medical improvement on August 24, 2001, at which time the nature of Mr. Little's disability changed from temporary to permanent.

Although the labor market survey was developed in the fall of 2001, Mr. Little's counsel did not receive the survey until December 3, 2001. As a result, the extent of Mr. Little's disability was total until December 3, 2001.

Mr. Clark should receive temporary total disability compensation from April 10, 2001 to August 24, 2001 with permanent total disability payments until December 3, 2001. After that date, Mr. Clark does have some residual wage earning capacity. However, due to his condition, he can only realistically expect to find a job at minimum wage. Thus, he is entitled from December 3, 2001, and continuing, permanent partial disability compensation based on the difference between his average weekly wage at BIW and his potential earning at minimum wage.

Finally, Mr. Little is entitled to past, present, and future medical benefits associated with his odor intolerance.

#### Employer<sup>4</sup>

The Employer challenges Mr. Little's disability compensation claim in three areas: injury, causation, and work capacity. First, the Employer asserts Mr. Little has not suffered an injury within the meaning of the Act. By definition, an occupational disease requires exposure to harmful conditions of employment which are greater than employment risks in general. Tests conducted of Mr. Little's work environment showed no detectable exposure to any contaminants and Mr. Little has worn a respirator while engaged in his welding assignments. Further, Mr. Little has no pulmonary or respiratory problems.

Second, even if Mr. Little's condition is considered an occupational disease, he cannot establish either through a Section 20 (a) presumption or by the preponderance of the evidence that his work environment at BIW caused his problem. Notably, Mr. Little's sensitivity problems first occurred during a layoff period in 1991 when he worked as a welder for another company. While his symptoms also continued at BIW, he still experiences the problem even though he has left his job at BIW. In other words, Mr. Little's problems are related to life and not his work.

If Mr. Little is able to invoke the causation presumption, substantial evidence of non-causation exists. Mr. Little supports his claim with: a) Dr. Kern's diagnosis of work-related order intolerance to burning paint and primer; and, b) Ms. Oddleifson's finding of a work-related chemical-sensitive syndrome. Dr. Bokinsky found no basis for Ms. Oddleifson's conclusion and demonstrated the absence of any pulmonary problems. Dr. Kern's diagnosis is refuted by the evidence that Mr. Little's problem pre-dated his extensive period of welding at BIW and continued after his departure from

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<sup>4</sup>Post-hearing brief, dated July 19, 2002 and hearing presentation (TR, pages 12 to 14).

BIW. The preponderance of the evidence, including Mr. Little's new sensitivity to gasoline products, shows Mr. Little has an ordinary life condition unrelated to his BIW employment.

Third, even if Mr. Little has a work-related health problem, he remains fully capable of working in most environments such that he has not suffered any economic loss due to his odor intolerance. After leaving BIW, Mr. Little was obviously re-employable due the minimal odor restrictions imposed by Dr. Kern. The labor market survey confirmed the existence of multiple viable job opportunities in the local area. However, Mr. Little was only interested in certain jobs with good starting salaries. Of the jobs presented, he dismissed many for inappropriate reasons and did not submit any job applications. His behavior demonstrates his desire not to work. Accordingly, his claim for disability compensation should be denied.

### **SUMMARY OF EVIDENCE**

While I have read and considered all the evidence presented, I will only summarize below the information potentially relevant in addressing the issues.

#### **Sworn Testimony**

Mr. William Little  
TR, pages 20 to 77

[Direct examination] Mr. Little started working at BIW on August 28, 1989 as a material handler. He worked that job for about a year and then became a welder in the fall of 1990. For the rest of his employment with BIW, Mr. Little worked as a welder all over the work yard, including the assembly building, the ways where the vessels are put together, and the area where the panels are worked. His type of welding was called "shielded metal arc welding." He usually welded on primed, coated surfaces. When the ship was out on the water, some of the welded surfaces also had epoxy and enamel paints. The metal was usually stainless steel, aluminum or galvanized. The most troublesome fume came from welding epoxy surfaces. Also, burnt painted bothered him plus a certain type of primer used on the ships in the ways. Finally, plasma arc welding was a problem towards the end.

In response to these fumes, Mr. Little would experience an upset stomach. He became light-headed and had a "chokey feeling." Mr. Little used a respirator when welding. However, he did not have a respirator on when he walked in the work areas, especially on the ways, when taking breaks or getting tools. As a result, Mr. Little was exposed to fumes from other workers welding and grinding surfaces. By the end of work shift, he would be nauseated and extremely dizzy. While the symptoms would go away mildly in the evening away from work, getting up the next morning was "really bad." For a period of time, the symptoms would go away over the weekend. But towards the end, he could only work one day a week.

He stopped working at BIW on April 6, or April 10, 2001. After he stopped work, the

symptoms slowly improved. He had also noticed an improvement when he was out on strike in 2000 for several weeks. At the time of the hearing, Mr. Little “very rarely” experienced the nausea symptoms. The only time he has problems is when he’s exposed to chemicals or ozone. Consequently, Mr. Little believes his symptoms have progressed so that he notices a big difference. This stabilization occurred last fall.

Mr. Little first experienced the symptoms in 1992 when he was working on the ways. During a seven month layoff about 1991, Mr. Little did work at another company, Fisher Plows, as a welder for two months.

Since he has been out of work, Mr. Little has been “trying to find something to do” in wood harvesting or processing. He’s verbally applied at a few places and talked to some people, but the season is bad and the wood is not moving.

CX 14 are Mr. Little’s handwritten notes about contacts with employers. He didn’t contact Fisher Snow and Ice Control Equipment because he was familiar with the environment and it required familiarity with welding. He didn’t contact Pinkerton Security because it required personal contact and the business is two hours away. Mr. Little owns a car but it’s not insured. He could insure it to get to a job.

Mr. Little contacted Marine Hydraulic Engine Company and they were looking for a machinist and he doesn’t have any machinist experience. At Interstate Septic Systems there were no openings. Likewise, VIP Rockland was not taking applications. John Levantallier had nothing available. Eastern Tire only had an opening for a specialist. State Furniture had part-time second shift positions as a sander. However, they indicated painting and use of acetone would be going on in the area. Water Supply Company had nothing available but they were taking applications. Mr. Little did not submit an application. Nothing was available at Daniels Car Quest, Junior Metal Framer Manufacturing, Able Auto Parts, Puff and Stop, Sprowl Building Components, Goodwill Industries, Holiday Inn, Knox Brothers Auto Parts, VIP Discount Auto Parts, Crossroads Convenience Store, Mid Coast Limo, Central Maine Newspaper, Wal-Mart, and Knox Semiconductor. Builders Belfast and Comfort Inn were taking applications but had nothing available. He does not have carpenter experience. No answer at C.N. Brown.

Bob’s Variety had variable work positions based on experience. MBNA had a bill collector position. Mr. Little didn’t respond to either position. Sam’s Club was hiring in all positions. He didn’t apply because of the distance to the store and they were only offering \$6 per hour, 32 to 40 hours a week. Global Security had part-time work as needed. Mr. Little didn’t apply. Best Inn had part-time work at the front desk. Motel Six had part-time weekend housekeeping at \$6.50 an hour. Mr. Little does not have that type of experience. He also does not have sales or auto parts experience.

[Cross examination] Mr. Little is 31 years old and a high school graduate. He lives in Washington, Maine, between Rockland and Augusta. The town is closer to Augusta. He has a valid driver’s license and owns an inspected, registered, and uninsured car. He usually car-pooled to work

at Bath Iron Works and did not drive his own car.

The location of the wood processing work is about 10 to 12 miles from Washington. He was planning on insuring his car and driving to that job.

Though the Labor Market Survey was sent to Ms. Cleveland on December 3, 2001, Mr. Little did not start contacting the listed employers until about January 16, 2002. He contacted the employers on that day by telephone. In February, for another three days, Mr. Little attempted to contact by telephone the employers he missed in January. Mr. Little did not submit any applications to the employers who indicated they were accepting applications.

Mr. Little didn't contact Fisher Snow Ice Control Equipment ("Fisher") because the job was welding and he was familiar with the fumes at Fisher. Mr. Little acknowledged a second listed job at Fisher was parts helper. He did not call them about that job.

Mr. Little didn't apply at Pinkerton Security due to a lack of transportation. That job would have been closer to him than his former work at BIW. Because the contact type for that job was "in person" and required a trip to Portland, Mr. Little didn't apply.

Between the time Mr. Little left work in April 2001 until the time of the hearing in March 2002, Mr. Little only applied in person at two locations that harvested wood. He made the contacts in November or December. They weren't hiring; however, Mr. Little was told that a job opening was pending.

After graduating from high school in 1989, Mr. Little first worked in a rope manufacturing plant for a short time. He did not experience any of his difficulties at that time. Then, he started working for BIW. In 1991, during a layoff, Mr. Little went to Fisher, which makes snow plows and worked as a welder.

When Mr. Little came to BIW, he had little welding skills. He obtain most of his welding skills through on-the-job-training.

Mr. Little experienced the symptoms of nausea and light-headedness at Fisher too. When he left Fisher and returned to BIW, he "had pretty much the same symptoms." During this period, the symptoms would come and go.

After Mr. Little informed BIW about his symptoms, they gave him a personal monitoring device to wear during the work day and he wore it when he was welding and creating smoke and fumes. Within a few weeks after Mr. Little went out on strike, his symptoms "subsided." He didn't tell the doctors the symptoms went away completely; he just noticed an improvement.

Since April 2001, Mr. Little has not been exposed to the types of smells that formally triggered his symptoms. Presently, his symptoms have subsided and are minimal. The majority of the symptoms are gone. A couple times a months, when getting up in the morning, he is still a little

nauseous. He also has other symptoms not associated with his work at BIW. Specifically, Mr. Little is sensitive to petroleum-based products, such as gasoline. He hasn't reported that problem to a physician. At BIW, Mr. Little didn't have to work with petroleum-based products. Mr. Little is also troubled by ozone. He gets nauseated, dizzy and light-headed and has trouble breathing. The same type of symptoms he used to experience when welding. By his symptoms, he can tell when there is an ozone problem.

Mr. Little is not receiving any non-occupational disability compensation.

[Re-direct examination] The second person Mr. Little talked to about wood harvesting was in the process of obtaining a "big parcel of land" to harvest. That job would have paid \$10 to \$14 an hour.

[ALJ examination] Prior to graduating from high school, Mr. Little did not have his symptoms. He first experienced the problems about a year after starting to weld at BIW. He went to BIW First Aid at that time. Mr. Little first started using a respirator in 1993 or 1994. From that time on, he used a respirator when welding.

In looking at the jobs presented by the employer, if Mr. Little didn't have experience in the area, he would discount that job. Likewise, he discounted the work if it paid minimum wage or part-time.

His commute to BIW was about 45 minutes to an hour.

Wood removal involves the use of heavy equipment. Mr. Little has little experience with heavy equipment, but he has operated a front end loader. The wood harvest equipment has air-conditioned cabins. Mr. Little will possibly be exposed to petroleum-based products around the heavy equipment.

Mr. Little rarely experiences his symptoms. When the ozone is bad, he gets light-headed and experiences slight nausea. He had problems in the summer of 2001 when the ozone was high. Based on the news, he knew when the ozone was a problem. He has informed Dr. Kern about the ozone problem. Dr. Kern is not treating him for it.

Over the course of his ten years of welding, the symptoms worsened. Until the strike in 2000, he wasn't really sure what was causing the problem. He returned to work in November 2000.

Mr. Little doesn't know why he hasn't looked for any other work besides wood harvesting.

Mr. Arthur M. Stevens, Jr.

Mr. Stevens is a self-employed vocational consultant and a certified career development facilitator. He has worked in that capacity since February 1994.

For the present case, Mr. Stevens prepared a labor market survey (EX 12). After reviewing Mr. Little's medical file, Mr. Stevens used direct employer contact, newspaper want ads and a computer job bank to develop the labor market survey. The calls to the various employers were made between October 15, 2001 and November 1, 2001. The newspaper survey covered several local newspapers for a period from April 2001 to around November 2001.

To establish Mr. Little's physical limitations, Mr. Stevens relied on Dr. Kern's May 15, 2001 Form M1, a Maine form which is used to identify work restrictions. Each of the employer's listings has the date of contact. For commuting distance, Mr. Stevens used Mr. Little's former commute to BIW.

The Maine Job Service Listing contains jobs that Mr. Stevens believes are open. He obtained the information through the internet. Employers register actual jobs with the state of Maine and people looking for work can use the Job Service Listing to identify registered employers. Some of the employers provide wage information.

In August 2001, the unemployment rates for various locations in the local area ranged from 2.1% to 3.4%. These percentages indicate a fairly strong and stable labor market for both full time and part time work.

Mr. Stevens believes Mr. Little's wage earning capacity would be between \$7.50 and \$8.50 an hour. Some of the entry level jobs did pay higher wages.

In reviewing CX 14, Mr. Stevens observed that he would expect many of the jobs identified in mid-October 2001 would have been filled by January 2002. Mr. Stevens' review of the employer advertising in recent newspapers indicates jobs similar to those identified in the labor market survey are still available with similar pay ranges. Mr. Stevens believes Mr. Little has the same wage earning capacity in March 2002 as the capability identified in October 2001.

Mr. Stevens identified the appropriate job at Fisher by using an arrow to point to it.

EX 21 contains copies of job ads in local newspapers from October 2001 to February 28, 2002. On the exhibit, Mr. Stevens has highlighted jobs he believes are suitable for Mr. Little considering his work restrictions and educational and work backgrounds. These jobs are similar to the types of jobs identified in the labor market survey with similar rates of pay.

[Cross examination] The ads in EX 21 don't really contain wage information. Some of the positions include gas station attendant. If in fact Mr. Little is sensitive to petroleum products, that

would not be suitable work. Mr. Stevens based his review on Dr. Kern's Form M1.

Most former BIW employees obtain non-union jobs at lower pay, especially if that person lacks additional training or skills. Contacting friends and networking is a good approach to finding work. Mr. Stevens encourages the practice. In his work, he also tries to get a person the best possible hourly wage. Depending in part on motivation, persons are placed in jobs between two weeks and six months. Typically, a motivated client is placed in a new job within a month and two months. Mr. Stevens might be able to speed up the process for clients.

[ALJ examination] The fact a person takes a lower paying job than the one he had at BIW does not preclude that person from continuing to look for a higher paying job.

### **Documentary Evidence**

#### Notice of Injury, LS-201 and Notice of Claim, LS-203 CX 1, CX 2, EX 1, and EX 2

On April 10, 2001, Mr. Little filed a Notice of Injury alleging "multiple chemical sensitivity" due to his work at BIW. The date of injury is listed as April 6, 2001. Also, on April 10, 2001, Mr. Little filed a corresponding disability compensation claim.

#### Miles Health Care Center CX 8, CX 13, EX 15, and EX 18

On September 16, 1993, Mr. Little presented at the health care center with a two year history of intermittent abdominal discomfort (a burning sensation) with low grade nausea mostly in the mornings. He was employed as a welder. The physical examination was normal.<sup>5</sup>

Mr. Williams returned to the clinic on April 13, 2000 claiming fumes at work were making him nauseous and dizzy. He believes work is causing the problems because after a few day off, he feels better and then the symptoms worsen as the work week progresses. The examination was unremarkable. The diagnosis was nausea secondary to climate, sinus, or gastritis. Mr. Little received some nose spray.

At the follow-up appointment two weeks later, Mr. Little reported some improvement. The examination was normal. Although the nausea and sinus problem had improved, he remained anxious and stressed with his work at BIW. Physician Assistant ("PA") Andrew Zuber wondered whether his anxiousness might be an underlying cause of his most of his problems.

On June 21, 2000, Mr. Little presented with severe diarrhea for a month. The diagnosis was

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<sup>5</sup>This clinic note references additional comments on the reverse side of the sheet; however, the copy presented for the record contains nothing on the back side.

chronic fatigue and anxiety. Mr. Little received an allergy prescription.

On July 27, 2000, Mr. Little told PA Jennifer Oddleifson that he continued to experience terrible nausea. Although he wore a respirator, Mr. Little believed his problem was related to his work at BIW because the fumes bothered him. Although he usually felt fine on Mondays, by the end of his shift he was in distress. Mr. Little reported that the epigastric distress and extreme nausea had worsened over the last four or five years. He reported that on vacation, the symptoms were gone. At work, Mr. Little suffered the most when he worked inside. Mr. Little wanted to continue to work at BIW but was “frantic” about his symptoms which he attributed to welding. In an effort to isolate a cause, PA Oddleifson placed Mr. Little on a six week work restriction in which Mr. Little would not be exposed to welding fumes. BIW received the work restriction document on August 1, 2000.

Upon his return on August 28, 2000, Mr. Little informed PA Oddleifson that his symptoms seemed more pronounced when he welded on painted surfaces. As PA Oddleifson requested, BIW had taken Mr. Little off welding and given him other work. PA Oddleifson’s examination of Mr. Little was normal other than some stomach tenderness. She ordered an endoscope examination; the test was accomplished August 30, 2000 and suggested gastritis. Concerning the welding work restriction, PA Oddleifson reported that Mr. Little:

had to do that during the day shift and he said that after a few days of being on the day shift, he just could not stand getting up early. It was too much of a change for him. So, he decided to go back to welding on the second shift and the symptoms came back.

On November 14, 2000, Mr. Little reported that he had felt terrific during two and a half month strike. Back at work, he noticed more symptoms when working in an enclosed space with other welders. The physical examination was normal. Mr. Little did not struggle with shortness of breath or chest pain. PA Oddleifson concluded Mr. Little had a systemic reaction to welding fumes.

During the December 18, 2000 visit, Mr. Little reported that fumes from welding stainless steel and epoxy paint caused the worse symptoms of nausea, gastric pain, headaches, and dizziness. The examination was normal and Mr. Little’s lungs were clear. PA Oddleifson indicated she needed to determine that substances Mr. Little was being exposed to and if they could cause his symptoms. Due to the relationship of his symptoms to his work, Mr. Little believed it was “very obvious” the fumes were the problem. PA Oddleifson told Mr. Little to always wear his respirator. She suggested he attempt to get other work at BIW and obtain information about the substances in the fumes.

On February 5, 2001, Mr. Little reported that he is progressively getting more desperate and now misses about one day a week of work. He starts Monday feeling fine, but after two days, he needs one day to recover before he can finish the week on Thursday and Friday. So far, he has been unable to obtain any information on the substances from BIW. PA Oddleifson concluded Mr. Little needed to be away from the fumes and they would initiate the workers’ compensation system. The

physical examination was normal. PA Oddleifson sent a Form M1 to BIW stating Mr. Little had full work capacity but after the second day at work he felt ill and couldn't function.

By March 21, 2001, Mr. Little had seen Dr. Mazorra at BIW who told Mr. Little his problem was stress. An endoscopy also showed Mr. Little did not have an ulcer. PA Oddleifson pointed out that the "timely relationship" between Mr. Little's symptoms and work was "quite clear." Absent any information on the possible harmful substances, she wanted Mr. Little to have an occupational health evaluation. She believed a chemical sensitivity syndrome to welding fumes might be present.

On November 11, 2001, Mr. Little reported being out of work since April 2001. He had seen Dr. Kern who placed him on strict restrictions. Mr. Little was not able to continue his work. Mr. Little was struggling with financial distress and very worried. He reported feeling much better with no recurrence of symptoms other than gastric pains related to his financial worries. He does not experience nausea. The examination was normal. PA Oddleifson diagnosed gastroesophageal reflux, probably secondary to stress.

Dr. Garth A. Miller  
CX 9 and EX 16

On February 16, 2001, Dr. Miller examined Mr. Little, who reported worsening symptoms of nausea and abdominal pain with improvement when he was off work as a welder. The physical examination was normal. Dr. Miller recommended an endoscopy examination, which he subsequently conducted on February 26, 2001. According to Dr. Miller, the procedure produced a negative biopsy and established only mild duodenitis. Dr. Miller opined Mr. Little's headache and nausea were occupation-related. According to the physician, "this may represent a toxic exposure of low level to substances such as carbon monoxide or hydrogen sulfide that might be produced as a result of welding or other combustible materials." Dr. Miller recommended further evaluation for toxic exposure.

Dr. David G. Kern  
CX 10, CX 13, and EX 17

On May 1, 2001, Dr. Kern board certified in internal medicine,<sup>6</sup> examined Mr. Little, who explained that during his first two years with BIW, he didn't have any problems. After that time, he experienced periodic queasiness, mild nausea and light-headedness. Early on, the symptoms, which occurred about every three weeks, would go away on his drive home. However, over the years, the symptoms' frequency increased and by May 2000, he had the problems two to three times a week. Dr. Kern particularly noted that the symptoms occurred "even when wearing an airline respirator and even when he has not been welding." Mr. Little believes he is responding to paint vapors in the work environment. Another notable aspect in the history was Mr. Little's report of using spray paint on a motorcycle at home, outside, and while the vapor was strong, "he did not develop symptoms."

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<sup>6</sup>I take judicial notice of Dr Kern's board certification and have attached the certification documentation.

Mr. Little reported no allergies and the physical examination was normal and the lungs were clear. Dr. Kern found no evidence of asthma, solvent intoxication, “fume fever,” or “other recognized clinical entity.” As a result, he diagnosed “odor intolerance with conditioned response” to burning paint and comparable orders (not welding fumes).” As a treatment plan, Dr. Kern intended to explain the situation to Mr. Little, obtain more information from old records and Material Safety Data Sheets, and consider application of de-sensitization treatment.

Subsequently, after a review of Mr. Little’s primary care medical records, the material safety data, and other tests including the endoscopy, Dr. Kern developed a more detailed history of Mr. Little’s symptoms, which extended from his 1992 complaints, to PA Zuber’s belief of an anxiety disorder, to PA Oddleifson’s conclusion of workplace exposure, to the upper GI series indicating mild gastritis, to Dr. Miller’s findings of mild duodenitis, normal blood studies and thyroid function test. Dr. Kern also reviewed the material safety data relating to the various metallic coatings, epoxy, and fluxes used in welding at BIW. Several of these items contained amounts of isopropanol, xylene, lead, ethylene glycol-ether, and aromatic amines. Finally, Dr. Kern noted that Mr. Little’s duodenitis was negative for H. Pylori, and his system was unresponsive to H2 blockers and PPI agents. On his Form M1 to BIW, Dr. Kern diagnosed odor intolerance to paint and primer with a conditioned response. He indicated Mr. Little was capable of regular duty.

After this extensive record review, and highlighting the following additional factors concerning Mr. Little’s complaints, Dr. Kern remained confident that the workplace paint odors, rather than welding fumes, were responsible for Mr. Little’s problems. First, Dr. Kern noted that Mr. Little experienced the onset of symptoms on the second, or later, day(s) of the work week rather than the first day. Dr. Kern believed that pattern was inconsistent with metal or polymer fume fever. Second, Mr. Little reported that he experienced the symptoms in the general yard environment, “even when not welding.” Third, the coming and going of the work-related symptoms was also inconsistent with lead poisoning.

About mid May 2001, Dr. Kern placed Mr. Little on modified work capacity and sent BIW another Form M1 to that effect. Specifically, the physician indicated Mr. Little should not be exposed to burning paint/primer or associated odors. He also indicated Mr. Little’s condition was work-related.

On May 31, 2001, Mr. Little told Dr. Kern that he was feeling better since leaving BIW. Mr. Little again addressed whether welding fumes were responsible after noting that a) even when welding on un-coated metal at Fisher in 1991, he “felt miserable”; and, recently, after he was in a shop with a friend who was welding on mild steel, the symptoms returned. Dr. Kern explained “that given his symptoms being experienced even when he was just walking in the yard, the concentration of such vapors and fumes would be so low as to preclude their causing a toxic reaction rather than a response to odor.” His Form M1 to BIW remained unchanged from the mid-May report.

On August 24, 2001, Dr. Kern addressed the issue of whether Mr. Little’s condition was work-related. Dr. Kern reiterated his opinion that “Mr. Little developed an odor intolerance with conditioned behavioral response as a consequence of his occupational exposure to burning paints and

other metal coatings at Bath Iron Works.”Mr. Little was not experiencing direct toxicity due to the nature of that chemical exposure. At the same time, Dr. Kern opined Mr. Little’s “symptoms are very real and reflected classical conditioning to odors present at BIW.” Dr. Kern considers this type of disability to be objectively identifiable. Dr. Kern stated, “Mr. Little probably sustained this disability as a result of his occupational exposure at Bath Iron Works.”

Dr. Kern again examined Mr. Little on September 11, 2001. Mr. Little noted gradual improvement. However, Mr. Little still had mild nausea, light-headedness, and shortness of breath. Mr. Little also reported experiencing comparable symptoms during the summer on days with high ozone levels. The examination was normal and the chest was clear. Dr. Kern’s diagnosis was odor intolerance with conditioned behavioral response to burning paints, primers, and welding fumes. His Form M1 to BIW reflected this work restriction. He encouraged Mr. Little to look for a new career that did not involve such exposure.

Dr. George E. Bokinsky  
CX 11, EX 20, and EX 22

On December 20, 2001, Dr. Bokinsky, board certified in internal medicine and pulmonary disease, conducted a medical record review and examined Mr. Little. Having worked as a welder, Mr. Little explained that his symptoms of nausea, dizziness and light-headedness started about 1994 and had been worsening over the years. Prior to leaving BIW, the symptoms would become more pronounced as that work week progressed. Since leaving BIW, his symptoms have gradually improved although he does experience some shortness of breath during periods of high ozone.

Upon physical examination, Dr. Bokinsky found no abnormalities and the pulmonary function test was nearly normal. As a result, the doctor concluded Mr. Little did not have an on-going disease, industrial asthma or pneumoconiosis. He specifically stated Mr. Little did not have an underlying pulmonary disease that was caused, or aggravated, by his work at BIW. While admitting the concept was controversial, Dr. Bokinsky also indicated “it is likely that exposure to fumes of both an irritant and sensitizing nature can occur in the work environment and produce a variety of symptoms that may become chronic and progressive in nature.”

In a June 21, 2002 deposition, Dr. Bokinsky recalled both his December 2001 examination of Mr. Little and review of his medical records, including the reports of Dr. Miller and Dr. Kern. The physical examination and chest x-ray were normal. The pulmonary function test was essentially normal with only some decrease in diffusion capability for CO. Mr. Little’s presenting complaint consisted of nausea, dizziness, and headaches. He did not report any respiratory problems other than difficulty breathing in hot and humid weather. According to Mr. Little, over the years, his symptoms have become more severe. They increased during the work week and diminished over the weekends. By the time he left BIW, Mr. Little was only able to work one day a week. After leaving BIW, his symptoms resolved. Due to the absence of any pulmonary symptoms, Dr. Bokinsky concluded Mr. Little did not have: a) any pulmonary disease caused by his work; b) occupationally-acquired asthma; and, c) isocyanic (a chemical irritant contained in some paints) asthma. Dr. Bokinsky also did not

specifically diagnosis multi-chemical sensitivity.

BIW Health Department Medical Records  
CX 12 and EX 19

On April 11, 1991, Mr. Little reported to the Health Department that he felt ill after being exposed to epoxy the night before. The health care provider advised Mr. Little to ensure proper fit of his respirator. His supervisor was advised to check the work place ventilation.

On November 20, 1991, Mr. Little returned with complaints of nausea and dry heaves for the previous two days. He had been experiencing these symptoms for three or four months. The health care provider indicated the cause of the nausea was unknown. Mr. Little was advised to change his lifestyle and diet, and rest more.

Mr. Little again reported severe nausea, vomiting, and a burning sensation on January 21, 1992. He reported H2 blocker medication had not helped. Mr. Little looked uncomfortable. The health care specialist suggested a work-up.

A March 26, 1992 entry documents Mr. Little's nausea and a burning pain in his belly.

On October 12, 1993, Mr. Little reported nausea and stomach problems with using certain types of flux. Even though he wore a respirator, Mr. Little reported welding made his condition worse. The diagnosis was nausea of an unknown etiology.

Mr. Little reported the return of stomach problems on August 15, 1996 which were similar to his experience a few years earlier. He was not sure if the condition was work-related.

Four years later, on April 19, 2000, Mr. Little returned to the Health Department and reported suffering an upset stomach after welding on epoxy paint that had been poorly removed. He experienced these symptoms two to three times a week. The health care provider diagnosed upset stomach and returned Mr. Little to work without restrictions.

On August 1, 2000, Mr. Little reported that he had been placed on a six week work restriction away from welding fumes. This restriction caused a change in his work shift (from second shift to the first shift). However, his GI symptoms had worsened significantly following the change in shifts. According to Mr. Little, "I can barely get into work because I am so nauseated and drive heaving." At the same time, not being around welding did help improve his dizziness symptoms. Mr. Little was returned to work without restrictions.

Mr. Little reported on November 28, 2000 that "this place is poisoning me." He stated, "every day I get up my stomach hurts, my lungs burn. It's got to be from here. I was fine during the strike." The diagnosis was non-occupational GI upset.

On February 13, 2001, Mr. Little indicated that PA Oddleifson had determined that something in the air was poisoning Mr. Little.

In an April 30, 2001 clinical note, the health care provider considered Dr. Miller's suggestion that Mr. Little's symptoms may be a reaction to toxic material. However, the health care provider dissented to that opinion because the sampling indicated no toxic material within his breathing zone. Additionally, Mr. Little had told the provider that during the strike, he had been free of his symptoms even though he welded in his garage. Consequently, the job of welding was not the cause of the problem. While an argument could be made that Mr. Little was reacting to his job location rather than the specific function of welding, any causation would be based on his subjective complaints. Objectively, the BIW personal sampling does not show any overexposure.

Dr. Maria Mazorra  
CX 12 and EX 19

On February 15, 2001, Dr. Mazorra, the BIW chief of occupational medicine, met Mr. Little who described his welding work and symptoms. According to Mr. Little, his problems with nausea had progressively worsened since he started welding at BIW in 1990. Mr. Little also noted that when he went out on strike recently, he was fine. When Dr. Mazorra queried whether the stress of coming to work might be the problem, Mr. Little refuted that possibility indicating that anti-anxiety and anti-depression medication had no effect on his symptoms. He also reported having to take Wednesdays off to get through the work week. Considering the pattern of Mr. Little's symptoms, and his use of a respirators and appropriate ventilation, Dr. Mazorra had difficulty relating his symptoms to welding fume exposure. However, she suggested a personal sampling test at the time of his work.

On February 22, 2001, Mr. Little's exposure to contaminants of fumes, chromium, manganese, nickel, and zinc was tested. At that time, Mr. Little reported that his symptoms occurred with and without a respirator and whether or not he was actually welding. Mr. Little maintained his condition was work-related and had become worse since his assignment to ship completion. He also observed that he had no problem welding bare steel outside the yard. For a total of 67 minutes, Mr. Little's exposure during several welding tasks was monitored. The test results detected various material but not in any quantifiable amounts.

When Dr. Mazorra reviewed the test results, she observed all the sample measurements were below permissible levels and showed no signs of overexposure. Based on the monitor test, Dr. Mazorra continued to have difficulty attributing Mr. Little's symptoms to his work environment.

In an April 16, 2001 letter to PA Oddleifson, Dr. Mazorra informed her that the personal sampling results were below permissible exposure levels. Accordingly, Dr. Mazorra could not support a claim of work-relatedness. The physician did acknowledge "some individuals may have a sensitivity in spite of being within the established safe limits." Yet, in Mr. Little's case, the contaminants "were barely detectable and not quantifiable." Dr. Mazorra indicated that a positive pressure respirator was available to Mr. Little if he wanted to use it. The union labor contract precluded a change in job positions.

Mr. Little's Employer Contact Chart  
CX 14

In response to the Employer's labor market survey, Mr. Little contacted numerous employers and prepared a chart indicating the results. Of the 34 employers, Mr. Little contacted all but three of the companies (Mr. Little decided not to call two employers and a third employer did not return his phone calls). Seventeen of the employers had nothing available. Four employers were taking applications. Mr. Little didn't have the requisite experience for six employers and another job involved exposure to paint. Mr. Little felt three of the jobs were unsuitable due to the transportation requirements. The accompany sheets from the labor market survey also contain Mr. Little's annotations reflected in the chart, about eight of the entries are dated January 16, 2002. The labor market survey shows the employment information for each employer was based on direct contact between October 16, 2001 and November 1, 2001.

Labor Market Survey  
EX 12 and EX 21

On November 1, 2001, Mr. Arthur M. Stevens completed a labor market survey. In preparation to his survey, Mr. Stevens reviewed Mr. Little's education background (high school graduate) and work education (vocational and on-the-job training) and experience (welder for 12 years). He also considered Mr. Little's work capacity restrictions as imposed by Dr. Kern, as augmented by the records of Dr. Miller and PA Oddleifson. According to Dr. Kern, Mr. Little's work could not involve inhalation exposure to burnt paint, primer, and associated odors. As the local area for the job search, Mr. Stevens considered jobs between 23 and 61 miles of Mr. Little's residence. His survey consisted of three parts: direct employer contacts, review of newspaper classified job ads, and review of the Maine Job Service Listing. All three categories involved consideration of job availability from April 6, 2001 to November 1, 2001. In his experience, Mr. Stevens expects a motivated job hunter to make a minimum of 1 to 2 job contacts a day. Based on his analysis, Mr. Stevens concluded Mr. Little could have found work in Maine's stable labor market at an hourly wage ranging from \$7.50 to \$8.50. Additionally, Mr. Stevens provided statistical information showing Maine's unemployment rate for August 2001 was 3.1%, below the national average of 4.9%.

Mr. Steven's direct employer contacts found numerous work opportunities in an array of jobs, including security officer, cashier, construction crew member, sales person, parts helper, motel front desk attendant, and assembler. The hourly wages ranged from \$5.75 to \$12.71. The newspaper job ads presented a plethora of jobs, including: warehouse worker, housekeeping, food services, construction, mason tender, carpenter helper, sales, seafood processing, custodian, security officer, customer service, sales, cashier, mail room clerk, and laborer. Very few of the job opportunities contained wage information. Finally, a review of the Maine Job Service Listing showed work available in the areas of: picker, packer, delivery driver, laborer, shipping clerk, assembler, cashier, janitor, mail clerk, customer service, security officer, production worker, stocker, sales, warehouse worker, installer, bagger, and counter helper. Of the wage information provided, the hourly rate

ranged from \$6.00 to \$11.31. Most of the jobs listed hourly wages between \$7.00 and \$8.00.

Classified job ads from the local papers for February 17, and February 28, 2002 showed several available jobs, including: mailroom clerk, small parts assembler, counter person, front clerk, Home Depot retailer, cashier, dispatcher, sales, and security.

## **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

### **Stipulations of Fact**

At the hearing, the parties stipulated to the following facts: a) on April 6, 2001, the last day Mr. Little worked at Bath Iron Works, an employer-employee relationship existed between the parties; b) the appropriate average weekly wage is \$572.76; c) the appropriate notices in the case were filed in a timely manner; and, d) the Labor Market Survey was mailed to Ms. Cleveland on December 3, 2001 (TR, pages 10, 11, and 49).

### **Issue No. 1 - Causation**

If a claimant establishes the existence of an injury, as defined by the Act, and then provides evidence of the occurrence of a work-related accident or conditions that could have caused the injury, the courts and Benefit Review Board have interpreted Section 20 (a) of the Act, 33 U.S.C. § 920 (a), to invoke a presumption on behalf of a claimant that, absent substantial evidence to the contrary, the injury was caused by the claimant's work. In a similar manner, for occupational disease cases, an "injury" within the meaning of the Act does not occur until the accumulated effects of the harmful substance manifest themselves and the claimant becomes aware of the relationship between the employment, the disease, and the disability. *Travelers Ins. Co. v. Cardillo*, 225 F. 2d 137 (2d Cir.), *cert. denied*, 350 U.S. 913 (1955). Generally, "injury" means some physical harm in that something has gone wrong with the human frame. *Crawford v. Director, OWCP*, 932 F.2d 152 (2d Cir. 1991). If a claimant's employment aggravates a non-work related, underlying disease or condition, so as to produce incapacitating symptoms, the resulting disability is compensable. *Gardner v. Bath Iron Works, Corp.*, 11 BRBS 556 (1979), *aff'd sub nom.*, *Gardner v. Director, OWCP*, 640 F.2d 1385 (1st Cir. 1981). A claimant's credible complaints may provide a sufficient basis for finding the presence of an injury, *Sylvester v. Bethlehem Steel Corp.*, 14 BRBS 234, 236 (1981), *aff'd sub nom.*, *Sylvester v. Director, OWCP*, 681 F.2d 359 (5th Cir. 1982). Thus, under Section 20 (a), if a claimant demonstrates the existence of some health derangement or harm and the existence of working conditions or hazards that could have caused the harm, a presumption exists that the claimant's exposure at work caused the derangement. *See Sinclair v. United Food & Commercial Workers*, 23 BRBS 148 (1989).

### **Section 20 (a) Presumption**

Through his testimony, the Miles Health Care Center medical records, BIW Health Department records, and Dr. Kern, Mr. Little has established that something is wrong with his health.

Over a period of years, Mr. Little has struggled with recurring and worsening nausea, dizziness and light-headedness. He appeared to be a candid witness before me and no health care provider has challenged his representation about his symptoms. Further, Dr. Kern characterized Mr. Little's symptoms as "very real" and diagnosed Mr. Little's intolerance to burnt paint and epoxy odors, with a corresponding adverse physical conditioned response. As a result, Mr. Little has established the existence of an injury related to his odor intolerance of burnt paint and epoxy.<sup>7</sup>

For over ten years, Mr. Little has worked as a welder at the ship fabrication yard at BIW. Although the personal sampling test did not demonstrate the presence of measurable contaminants during his welding, that monitoring did detect contaminants. Additionally, Mr. Little's credible testimony establishes that his work environment contained welding fumes and burnt paint and epoxy odors associated with welding surfaces covered with paint and epoxy. Likewise, although the use of a respirator might provide protection, he only wore the respirator while actually welding. The rest of the time, he was exposed to the industrial atmosphere at BIW. Consequently, I find Mr. Little's work environment contained odors that may have caused, or aggravated, his odor intolerance to those fumes to the extent that he responded with symptoms of nausea, dizziness and light-headedness.

Mr. Little presented testimony and medical evidence showing that he has an odor intolerance to burnt paint and epoxy fumes which causes physical symptoms. His work environment at BIW contained such fumes. Accordingly, Mr. Little has invoked the presumption under Section 20 (a) that his odor intolerance with conditioned behavior was caused by his employment at BIW.

#### Substantial Contrary Evidence

To rebut the Section 20 (a) causation presumption, the employer must present specific medical evidence proving the absence of, or severing, the connection between the bodily harm and the employee's working condition. *Parsons Corp. v. Director, OWCP (Gunter)*, 619 F.2d 38 (9th Cir. 1980). The U.S. Circuit courts have rendered different views on the extent of such evidence. In *Brown v. Jacksonville Shipyards, Inc.*, 554 F.2d 1075 (11<sup>th</sup> Cir. 1990), the U.S. Court of Appeals for the Eleventh Circuit required that the employer produce evidence which ruled out the possibility of a causal relationship between the claimant's employment and injury. On the other hand, in *Conoco, Inc. v. Director, OWCP [Prewitt]*, 194 F.3d 684 (5<sup>th</sup> Cir. 1999), the U.S. Court of Appeals for the Fifth Circuit rejected the "rule out" standard. Instead, according to that court, an employer must produce evidence that a reasonable mind might accept as adequate to support a conclusion that the accident did not cause the injury. That is, according to the appeals court in the First Circuit, the employer must provide the kind of evidence a reasonable mind might accept as adequate to support a conclusion. *Travelers Ins. Co. v. Belair*, 412 F.2d 297 (1<sup>st</sup> Cir. 1969).

Guided by the First Circuit's reasonable mind standard, I find principally in the form of Dr.

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<sup>7</sup>The characterization of this injury is the second issue in this case.

Mazorra's opinion, and the personal sampling test results, the Employer has presented sufficient and reasonable evidence to support a conclusion that Mr. Little's exposure to welding is not the cause of his problem. Since the personal sampling test of Mr. Little's breathing zone while welding produced barely detectable levels of contaminants, Dr. Mazorra concluded Mr. Little's symptoms were not related to this exposure or his work. Through the production of this reasonable evidence, the Employer has rebutted the Section 20 (a) presumption invoked by Mr. Little.

#### Causation Determination

Once the Section 20 (a) presumption is rebutted, it no longer controls the adjudication. *Swinton v. J. Frank Kelly, Inc.* 554 F.2d 1075 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976). Instead, I must weigh all the evidence in the record and determine the causation issue based on the preponderance of the evidence. *Noble Drilling Co. v. Drake*, 795 F.2d 478 (5<sup>th</sup> Cir. 1986). As an initial step, I make the following specific findings concerning Mr. Little's work and his symptoms based both on various medical records and his testimony, which I found to be credible.

In the fall of 1990, Mr. Little begins welding at BIW. In that job, Mr. Little welds various types of metal usually covered with some type of coating, such as paint, epoxy, or primer. Starting in 1993, and continuing for the rest of his BIW employment, Mr. Little uses a respirator when welding. During the rest of the work day, when walking to job locations or taking breaks, he does not wear a respirator (Mr. Little's testimony).

On April 11, 1991, Mr. Little becomes ill after being exposed to epoxy (BIW Health Department record).<sup>8</sup>

Sometime in 1991, for seven months, Mr. Little is laid off at BIW. During this period, for two months, Mr. Little is a welder at Fisher Plow and experiences some nausea and light-headedness (Mr. Little's testimony).

By November 1991, for three months, Mr. Little has experienced periodic nausea (BIW Health Department record).

In January and March 1992, Mr. Little experiences severe nausea, vomiting and gastric pain (BIW Health Department record).

By September 1993, Mr. Little has experienced two years of intermittent abdominal pain

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<sup>8</sup>Mr. Little believes his first symptoms associated with his welding started about a year after he became a welder, probably in 1992. He also reported the symptoms occurred at Fisher Plow in 1991. However, I find this documented visit to the BIW Health Department, the most accurate record of when his symptoms first developed.

(Miles Health Care Center record).

In October 1993, Mr. Little experiences nausea and stomach problems after using certain types of welding flux. By this time, Mr. Little is using a respirator when he welds (BIW Health Department record).

In August 1996, Mr. Little has a recurrence of stomach problems; he is not sure whether the symptoms are work-related (BIW Health Department record).

In April 2000, Mr. Little suffers an upset stomach after welding a surface with some residual epoxy paint. He suffers the nausea about two to three times a week (BIW Health Department Record). His symptoms include nausea and dizziness. He also has some anxiety and stress at work. His symptoms improve when he is away from work and then progressively worsen over the course of the work week (Miles Health Care Center record).

By July 2000, Mr. Little's symptom of extreme nausea has become worse and persistent. His symptoms are more pronounced when he works inside. He believes welding is the cause (Miles Health Care Center record).

In August 2000, Mr. Little's nausea becomes more severe when he welds on painted surfaces (Miles Health Care Center Record). Mr. Little is reassigned to another job on a different shift that does not involve welding; however, his stomach problems become significantly worse and he returns to welding (BIW Health Department record).

During a two and half month strike, Mr. Little's symptoms improve (Mr. Little's testimony). However, upon his return to work in November 2000, the symptoms return and are more severe when working in enclosed areas (Miles Health Care Center Record). Due to the difference in his symptoms between the time he was out of work and when he is welding at BIW, Mr. Little believes his work place environment is poisoning him (BIW Health Department record).

In December 2000, fumes from welding stainless steel and epoxy paint cause the worsening symptoms of nausea, gastric pain, headaches and dizziness for Mr. Little (Miles Health Care Center record).

At the beginning of February 2001, Mr. Little must take the middle day of each work week off to be able to complete that last two days of work (Miles Health Care Center record).

Sometime before April 2001, due to his symptoms of nausea, dizziness and light-headedness, Mr. Little is only able to work one day a week (Mr. Little's testimony).

On April 6, 2001, Mr. Little works his last day as a welder at BIW. He stops working at BIW due to his symptoms. (Mr. Little's testimony).

By November 2001, Mr. Little is feeling better and most of his symptoms have improved (Miles Health Care Center record). He still experiences some periodic nausea in the mornings and develops similar symptoms when exposed to gasoline-products and high levels of ozone (Mr. Little's testimony).

With this symptomatic and work history framework in place, I next turn to the various, and diverse, medical opinions about the relationship between Mr. Little's nausea, dizziness, and light-headedness and his work at BIW.

In April 2000, PA Zuber suggested work-related anxiety and stress were the cause of Mr. Little's problems.

A few months later, PA Oddleifson focused on the timing of Mr. Little's symptoms and his work. She concluded the connection was clear and believed Mr. Little had a chemical sensitivity syndrome to the welding fumes.

Dr. Miller, after diagnosing mild duodenitis, raised the possibility that Mr. Little was responding to toxic exposure to substances related to his welding or other combustible materials.

Dr. Kern diagnosed work-related odor intolerance to burnt paint and other comparable substances with a conditioned response.

Dr. Bokinsky found no evidence of any pulmonary disease or occupational asthma. While he recognized that work place exposure to irritating and sensitizing fumes could produce chronic and progressive symptoms, Dr. Bokinsky definitively declined to make a diagnosis of multi-chemical sensitivity in Mr. Little's case.

Finally, in the absence of any measurable amounts of contaminants in Mr. Little's breathing zone at work, Dr. Mazorra was not able to support a conclusion that Mr. Little's symptoms were related to his work as a BIW welder. Dr. Mazorra suggested anxiety and stress may be the source of his ailments.

Since an obvious disagreement exists between these medical practitioners, I must first determine the respective relative probative weight of each assessment in terms of documentation and reasoning. As to the first factor, a physician's medical opinion is likely to be more comprehensive and probative if it is based on extensive objective medical documentation such as radiographic tests and physical examinations. *Hoffman v. B & G Construction Co.*, 8 B.L.R. 1-65 (1985). In other words, a doctor who considers an array of medical documentation that is both long (involving comprehensive testing) and deep (includes both the most recent medical information and past medical tests) is in a better position to present a more probative assessment than the physician who bases a diagnosis on a test or two and one encounter. Finally, in light of the extensive relationship a treating physician may have with a patient, the opinion of such a doctor may be given greater probative weight than the opinion of a non-treating physician. *See Downs v. Director, OWCP*, 152 F.3d 924 (9<sup>th</sup> Cir.

1998).

Reasoning, the second factor affecting relative probative value, involves an evaluation of the connections a physician makes based on the documentation before him or her. A doctor's reasoning that is both supported by objective medical tests and consistent with all the documentation in the record, is entitled to greater probative weight. *Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19 (1987). Additionally, to be considered well reasoned, the physician's conclusion must be stated without equivocation or vagueness. *Justice v. Island Creek Coal Co.*, 11 B.L.R. 1-91 (1988).

On the basis of documentation, the opinion of PA Zuber has diminished probative value because he saw Mr. Little only a couple of times and was not aware of the progressively deepening nature of Mr. Little's symptoms in the fall of 2000 and spring of 2001. In a similar manner, he did not have access to the personal sampling test results.

Although well documented due to her understanding of Mr. Little's symptoms and corresponding treatment, PA Oddleifson's opinion also has less relative probative value on the basis of incomplete reasoning. As she requested, BIW conducted the substance monitoring test of Mr. Little's work and Dr. Mazorra informed her of the negligible amounts of substances in his breathing zone. Yet, PA Oddleifson continued to present chemical-sensitivity syndrome due to welding fumes as her diagnosis without explaining how she was able to reach that finding in light of the monitoring test.

Next, both in terms of documentation and reasoning, Dr. Miller's opinion has less evidentiary value. Although he took a medical history from Mr. Little as part of his endoscopy exam, the physician was not aware of Mr. Little's entire medical record or the circumstances of his departure from BIW in April 2001. That limitation in documentation becomes apparent considering that he raised the possibility of toxic exposure without being aware of the breathing zone monitoring test results. Also, Dr. Miller's comment that toxic exposure may be involved in Mr. Little's case is an equivocal opinion and less reasoned than other medical opinions in the record.

The remaining three physicians, Dr. Bokinsky, Dr. Mazorra, and Dr. Kern presented documented and reasoned medical opinions. Relying on the absence of objectively measurable contaminants, Dr. Mazorra's opinion is certainly consistent with that monitoring test. At the same time, her suggestion that stress and anxiety are the cause of the problems is not particularly well reasoned because she doesn't address Mr. Little's observation that anti-anxiety and depression medication had no effect on his symptoms. Dr. Mazorra did mention the possibility of sensitivity to levels of toxic material that still met safety standards. However, her focus on the absence of any measurable levels of toxins causes her assessment to lose probative value when the causation issue is presented in terms of whether Mr. Little has developed a sensitivity to odors in the work place environment with an associated conditioned response.

On this central issue of odor intolerance, Dr. Bokinsky's opinion suffers a similar probative

deficit. Based on his recognition that exposure to irritating chemicals may cause a variety of symptoms that become chronic and progressive, Dr. Bokinsky did appear to at least consider Mr. Little's progressively developing symptoms. Subsequently, without explanation, he specifically declined to diagnosis multi-chemical sensitivity for Mr. Little. Absent any further explanation, Dr. Bokinsky's declination is not well reasoned. He may be relying on the absence of any pulmonary symptoms or perhaps he is aware of the monitoring test results. Certainly, having acknowledged that a variety symptoms due to sensitizing chemicals can become progressive, Dr. Bokinsky did not explain why Mr. Little's progressive and chronic symptoms did not fit that type of malady.

In contrast, Dr. Kern presented both a well documented and well reasoned medical opinion. In terms of documentation, Dr. Kern examined Mr. Little several times, treated him, reviewed his medical record, work history and practices and obtained information on the safety data relating to the fumes associated with Mr. Little's work.

In regard to reasoning, Dr. Kern he did not doubt that Mr. Little struggled with nausea, dizziness and light-headedness. Yet, in a manner similar to Dr. Bokinsky, Dr. Kern explained how he was also able to eliminate any pulmonary abnormality or disease, and any toxic poisoning, as possible causes of Mr. Little's problems. Further, based on close scrutiny of Mr. Little's work pattern and the nature of his complaints, Dr. Kern was also able to eliminate the fumes from his welding as the cause. Dr. Kern pointed out, and as verified by the monitoring tests, the concentrations of the welding toxins in the work environment would be too low to produce a toxic reaction, whereas as the odors associated with burnt paint would cause a response.<sup>9</sup> Specifically, Dr. Kern explained that Mr. Little experienced his symptoms whether or not he wore a respirator. In particular, Mr. Little felt his nausea in the general yard environment even when he was not welding.

Dr. Kern's opinion is additionally supported by other evidence in the record. Notably, based on PA Oddleifson's recommendation, Mr. Little stopped welding at BIW in August 2000 and moved to another job in the shipyard. However, in the shipyard, while away from welding but still exposed to the work place atmosphere, Mr. Little's symptoms remained severe. Additionally, the nature and progression of Mr. Little's symptoms do point to something at, or about, his work at BIW as the cause of his problems. When Mr. Little was away from BIW, on the weekends or on strike, he improved and felt better. When Mr. Little went to work, he got sick. I have considered PA Zuber's and Dr. Mazorra's suggestions that anxiety and stress are the root of Mr. Little's ailments. However, Mr. Little has indicated medication for stress and anxiety did not alleviate the symptoms. Additionally, no medical practitioner in this record has presented a definitive diagnosis of an anxiety disorder.

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<sup>9</sup>Dr. Kern reiterated his diagnosis consistently except on one occasion when he added welding fumes as one of the agent odors. Based on Dr. Kern's detailed explanation just described, I do not consider this one reference to welding fumes sufficient to raise an ambiguity concern about his medical opinion. I also note that on other occasions, Dr. Kern would reference "associated" or "comparable" odors. Thus, his use of the term "welding fumes" appears to be an effort to include the other types of odors.

In addition to being well-reasoned, documented, Dr. Kern's diagnosis of odor intolerance essentially stands alone and remains un-rebutted. Again, based on their focus on toxic substances, neither opinion by Dr. Mazorra or Dr. Bokinsky really refutes Dr. Kern's odor intolerance diagnosis. Consequently, I find Dr. Kern's diagnosis of odor intolerance with a conditioned behavioral response as a consequence of Mr. Little's occupational exposure to burnt paints and other metal coatings at BIW the most probative assessment in the record concerning causation.

In light of the monitoring test, the Employer's response to Mr. Little's disability claim is understandable. Certainly, Dr. Mazorra relied on the absence of measurable amounts of various chemicals associated with welding to concluded Mr. Little's symptoms were not work-related. However, that objective monitoring test does not sufficiently outweigh Dr. Kern's diagnosis. Although no measurable amounts of toxins were found and thus Mr. Little's breathing zone met safety standards, the test did establish detectable amounts, or traces, of those chemicals. Such chemical traces tend to support rather than contradict Dr. Kern's diagnosis. According to Dr. Kern, Mr. Little's physical symptoms are caused by his conditioned response to odors in the work environment and are not a toxic or poisoning reaction to such chemicals. As a result, while traces of toxic chemicals may not support a disability based on toxic poisoning, the presence of detectable chemicals as demonstrated by the sampling test in Mr. Little's work environment seems consistent with a disability linked to odor.

I have also considered the Employer's representation that causation is not establish because a) Mr. Little's symptoms first appeared at Fisher Plow rather than BIW; and b) even though he stopped working at BIW in April 2001, as of March 2002, Mr. Little was still experiencing nausea and had developed responses to ozone and petroleum products. I do not find that these considerations outweigh Dr. Kern's probative medical opinion. Since I don't have the exact dates of Mr. Little's employment at Fisher Plow, and based on the April 1991 BIW Health Department entry, I concluded that Mr. Little first symptoms associated with welding first occurred at BIW. Regardless of whether the reactions first started at Fisher Plow or BIW, the medical records and Mr. Little's testimony clearly establish that the symptoms became more frequent and intense as his work at BIW continued, clearly aggravating any propensity to sensitivity Mr. Little may have possessed prior to welding at BIW. In a similar manner, though Mr. Little still has some slight nausea and apparently reacts to petroleum products and ozone, the intensity and frequency of Mr. Little's post-BIW employment symptoms are starkly reduced in comparison to his physical condition while at BIW that eventually drove him out of his employment as a welder.

### Conclusion

Ultimately, I conclude, based on Dr. Kern's most probative medical opinion, that Mr. Little has developed an odor intolerance to burnt paint and comparable fumes with conditioned physical responses of nausea, dizziness, and light-headedness due to his employment at BIW. Accordingly, Mr. Little has established that his ailment is work-related.

## Issue No. 2 - Occupational Disease or Injury

The definition of “injury” in Section 2 (2) of the Act includes both an accidental injury arising out of and in the course of employment and an occupational disease that arises naturally out of such employment. While the conditions of many claimants, such as a broken leg at work or the development of asbestosis due to asbestos exposure at work, are readily identifiable as either an accidental injury or occupational disease, other types of conditions, such as Mr. Little’s claimed disability, fall in a gray area that has engendered multiple decisions on, and definitions of, occupational disease.

In the absence of a Congressional definition of occupational disease, the courts have set out three requisite elements for an occupational disease under the Act. First, the disease must involve a “serious derangement of health.” *Gencarelle v. General Dynamics Corp.*, 892 F.2d 173, 176 (2d Cir. 1989). Due to the expansive interpretation of the Act in light of its humanitarian purpose, that term may be defined as something that has gone wrong with the human frame. *Crawford v. Director, OWCP*, 932 F. 2d 152 (2d Cir. 1991).

Second, while compensable injuries under the Act typically are associated with a traumatic accident, an occupational disease must be caused by a hazardous condition. *Gencarelle*, 892 F.2d at 176. Typically, the hazardous condition is environmental, such as asbestos or dust in the air.

Third, the hazardous condition must be peculiar to the claimant’s employment and be greater than the risks involved in other types of employment or ordinary living. *Id.* at 177. For example, in *Gencarelle*, the court concluded the claimant’s activities of bending, stooping, and climbing were not sufficiently peculiar to the claimant’s job as a maintenance worker; instead these conditions were common to many occupations and life in general. As a result, the claimant’s chronic synovitis of the knees was not an occupational disease.<sup>10</sup>

The following cases illustrate these three principles, especially the environmental aspect of a hazardous work environment in relation to the peculiar nature to a claimant’s work. In *Nardell v. Campbell Machine*, 525 F.2d 46 (9th Cir. 1975), the court affirmed disability benefits for a claimant whose pre-existing allergy and nerve conditions were aggravated by exposure to noxious fumes and welding smoke in the work environment. In *Graham v. Newport News Shipbuilding & Dry Dock Co.*, 10 BRBS 387 (1979), the Benefits Review Board (“BRB” or “Board”) indicated the exposure to welding fumes in a claimant’s work as a shipyard welder may support disability benefits due to associated pulmonary problems. In a similar manner, the Board in *Flowers v. Norfolk Shipbuilding*

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<sup>10</sup>The court also indicated these types of activities were not the type of repetitive biomechanical stresses that cause occupational diseases.

and *Dry Dock Corp.*, BRB No. 96-521 (Nov. 19, 1996) (unpublished),<sup>11</sup> directed consideration of a disability claim based on an industrial painter's developed sensitivity to epoxy paints that precluded his continued regular employment. As a final example, the Board in *Peterson v. Columbia Marine Lines*, 21 BRBS 299 (1988), determined a disability claim could be supported by a physician's opinion that the claimant's chemical hypersensitivity was due to the cumulative effect of chemical exposures over many years.

Before applying these three elements to the specifics of Mr. Little's case, I note that the U.S. Supreme Court has also weighed in on the occupational disease definition and added one additional factor. In *Bath Iron Works v. Director, OWCP*, 506 U.S. 153 (1993), the court determined hearing loss was not an occupational disease because the claimed injury occurred at the time of the exposure to the hazardous condition rather than developing over time after the exposure, such as a case of asbestosis. Thus, if the claimed injury is contemporaneous with the exposure, the condition is not an occupational disease.<sup>12</sup>

Applying the *Gencarelle* factors to Mr. Little's condition as defined by Dr. Kern, I believe all the requisite elements are present. That is, something has gone wrong with Mr. Little's health, in terms of the development of an odor intolerance and the associated incapacitating physical symptoms of nausea, dizziness and light-headedness. Additionally, Mr. Little's odor intolerance and physical reactions became more pronounced over a period of long term of exposure to odors at BIW. While actually naming his condition a "disease" seems a definitional stretch, the application of that term is very liberal such that I consider Mr. Little's ailment to fall under that rubric.

Secondly, as I determined in Issue No. 1, Mr. Little's odor intolerance with conditioned response was caused by his employment at BIW.

As to the third factor, Mr. Little was employed at the BIW shipyard for 12 years. While the environment may not have contained measurable amounts of contaminants, Mr. Little's testimony does establish the presence of burnt paint odors in the facility. Such odors were generated in part by the welding activities of the employees at BIW and represent potential atmospheric hazards greater those associated with other types of employment and ordinary living.

### **Issue No. 3 - Nature and Extent of Disability and Compensation**

Under the Act, a longshoreman's inability to work due to a work-related injury is addressed in terms of the nature of the disability (permanent or temporary) and extent of the disability (total or partial). In a claim for disability compensation, the claimant has the burden of proving, through

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<sup>11</sup>The text of this case is available on the BRB's website, [www.dol.gov/brb/brbdecisions.htm](http://www.dol.gov/brb/brbdecisions.htm).

<sup>12</sup>At the same time, the condition may still be compensable as an accidental injury since the gradual development of an injury over a period of time as a result of continuing exposure to conditions of employment is no bar to a finding of an injury within the meaning of the Act. *Bath Iron Works Corp. v. White*, 584 F.2d 569 (1st Cir. 1978) and *Moss v. Norfolk Shipbuilding & Dry Dock, Corp.*, 10 BRBS 428 (1979).

the preponderance of the evidence, both the nature and extent of disability. *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56, 59 (1985).

### Nature

The nature of a disability may be either temporary or permanent. Although the consequences of a work related injury may require long term medical treatment, an injured employee reaches maximum medical improvement (“MMI”) when his condition has stabilized. *Cherry v. Newport News Shipbuilding & Dry Dock Co.*, 8 BRBS 857 (1978). In other words, the nature of the worker’s injured condition becomes permanent and the worker has reached maximum medical improvement when the individual has received the maximum benefit of medical treatment such that his condition will not improve. *Trask*, 17 BRBS at 60. Any disability suffered by a claimant prior to MMI is considered temporary in nature. *Berkstresser v. Washington Metropolitan Area Transit Authority*, 16 BRBS 231 (1984). If a claimant has any residual disability after reaching MMI, then the nature of the disability is permanent.

Because Dr. Kern’s medical opinion is the most probative assessment on causation and he is the sole physician to diagnose and suggest treatment for Mr. Little for his odor intolerance, I turn to his medical notes to determine MMI. Following a May 31, 2001 appointment, Dr. Kern did not schedule Mr. Little for another appointment. Instead, he indicated that Mr. Little was to return as needed. Based on that reference, I find Mr. Little reached maximum medical improvement as of May 31, 2001. Prior to that date, the nature of any disability due to Mr. Little’s odor intolerance was temporary. From that day on, Mr. Little’s condition was permanent.

### Extent

The question of the extent of a disability, total or partial, is an economic as well as a medical concept. *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128, 131 (1991). The Act defines disability as an incapacity, due to an injury, to earn wages which the employee was receiving at the time of injury in the same or other employment. *McBride v. Eastman Kodak Co.*, 844 F.2d 797 (D.C. Cir. 1988). Total disability occurs if a claimant is not able to adequately return to his or her pre-injury, regular, full-time employment. *Del Vacchio v. Sun Shipbuilding & Dry Dock Co.*, 16 BRBS 190, 194 (1984). A disability compensation award requires a causal connection between the claimant’s physical injury and his or her inability to obtain work. The claimant must show an economic loss coupled with a physical and/or psychological impairment. *Sproull v. Stevedoring Servs. of America*, 25 BRBS 100, 110 (1991). Under this standard, a claimant may be found to have either suffered no loss, a partial loss, or a total loss of wage-earning capacity. Additionally, the employment-related injury need not be the sole cause, or primary factor, in a disability for compensation purposes. Rather, if an employment-related injury contributes to, combines with, or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. *Strachen Shipping v. Nash*, 782 F.2d 531 (5<sup>th</sup> Cir. 1986).

In light of these principles, determination of extent of disability involves a three step process.

*SEACO and Signal Mutual Indemnity Assoc., Limited v. Bess*, 120 F.3d 262 (4th Cir. 1997) (unpublished); *see also Newport News Shipbuilding & Dry Dock Company v. Tann*, 841 F.2d 540, 542 (4th Cir. 1988). As a first step, to establish a *prima facie* case of total disability, whether temporary or permanent in nature, a claimant has the initial burden of proof to show that he or she cannot return to his or her regular or usual employment due to work-related injuries. This evaluation of loss of wage earning capacity focuses both on the work that an injured employee is still able to perform and the availability of that type of work which he or she can do. *McBride*, 844 F.2d at 798. At this initial stage, the claimant need not establish that he cannot return to any employment, only that he cannot return to his former employment. *Elliot v. C & P Tel. Co.*, 16 BRBS 89 (1984). A claimant's credible testimony of considerable pain while performing work may be a sufficient basis for a disability compensation even though other evidence indicates the claimant has the capacity to do certain types of work. *Mijangos v. Avondale Shipping, Inc.*, 948 F.2d 194 (8th Cir. 1999); *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989).

#### Prima Facie Case

Due to his worsening physical condition as a consequence of odor intolerance, April 6, 2001 was the last day Mr. Little felt he could tolerate working at BIW. Apparently, on the basis of his next scheduled work day, his counsel has requested that a determination of total disability begin as of April 10, 2001. As previously noted, I found Mr. Little to be a credible witness. Additionally, Dr. Kern has opined that Mr. Little's symptoms are real. Although Dr. Kern initially determined Mr. Little could return to regular duty after his May 1, 2001 examination, he changed his mind two weeks later based upon review of Mr. Little's BIW and other medical records, concluding Mr. Little should not be exposed to burning paints, primers, and associated odors. As a result, based on Mr. Little's credible testimony, as collaterally supported by Dr. Kern's nearly contemporaneous work restriction, I find Mr. Little has established a *prima facie* case of total disability as of April 10, 2001.

#### Suitable Alternative Employment

If a claimant is able to demonstrate he is unable to return to his former job, then in the second step of the disability adjudication process, the employer has the burden of production to show that suitable alternate employment is available. *Nguyen v. Ebttide Fabricators*, 19 BRBS 142 (1986). The availability of suitable alternative employment involves defining the type of jobs the injured worker is reasonably capable of performing, considering his or her age, education, work experience and physical restrictions, and determining whether such jobs are reasonably available in the local community. *Newport News Shipbuilding and Dry Dock Co. v. Director*, OWCP, 592 F.2d 762, 765 (4th Cir. 1978) and *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038 (5th Cir. 1981). The showing of available suitable alternative employment may not be applied retroactively to the date of maximum medical improvement. An injured worker's total disability becomes partial on the earliest date that the employer shows suitable alternative employment. *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128, 131 (1991).

As an initial step in considering suitable alternative employment, I must establish Mr. Little's present ability to work. Clearly, based on his disability, he is not capable of working in an

environment that causes exposure to burnt paint and related odors. Otherwise, Mr. Little is a healthy thirty-one year old male with a high school education. He has also demonstrated his capability of learning a trade or vocation through his development of welding skills on-the-job at BIW.

To establish the existence of suitable alternative employment, the Employer has presented an extensive labor market survey developed by Mr. Stevens from direct employer contacts, newspaper job ads, and the Maine Job Service Listing. In preparing the report, Mr. Stevens only presented jobs that complied with Dr. Kern's work inhalation exposure restriction. According to Mr. Stevens and a few of the newspaper ads, some of these jobs have been available since April 2001. Additionally, based on Mr. Little's age, work history, medical limitation, education, and demonstrated training capability, Mr. Stevens believed Mr. Little was capable of earning \$7.50 to \$8.50 an hour in the local area. Through Mr. Stevens' presentation and his labor market survey, the Employer has successfully responded to Mr. Little's *prima facie* case of total disability by presenting evidence of suitable alternative employment in the local area since April 2001. Mr. Stevens has also presented evidence that similar employment opportunities existed in February 2002.

#### Attempt at Suitable Alternative Employment

If the employer does demonstrate that suitable alternate employment was available, then to carry his ultimate burden of proving total disability, the claimant must demonstrate a willingness to work and show he tried, with reasonable diligence, to obtain alternate employment but has been unable to do so. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1043 (5<sup>th</sup> Cir. 1981), *Williams v. Halter Marine Service*, 19 BRBS 248 (1987) and *Hoey v. Todd Shipyards Corp.*, 21 BRBS 258 (1988). If the employee does not meet this burden of proof, then he is considered employable and at most the extent of disability is partial, not total. See *Southern v. Farmers Export Company*, 17 BRBS 64 (1985).

In mid-January 2002 and at the beginning of February 2002, Mr. Little contacted most of the employers listed on the direct contact listing. He determined that most of these employers no longer had jobs available. Mr. Little additionally expressed an interest in working in the wood harvesting business. On his own, he had made two contacts in that industry but was not able to obtain work.

At first glance, Mr. Little's efforts seem to indicate the alternative employment presented by the Employer was not actually available. However, for the following reasons, I find Mr. Little's efforts fall well short. When Mr. Stevens prepared the list of direct employer contacts in October and November of 2001, openings were available at that time. Then, as stipulated, the Employer's lawyer mailed the labor market survey to the Claimant's counsel on December 3, 2001. Yet, for an unexplained reason, Mr. Little did not make his first contact with an employer on the listing until mid-January 2002. By that time, as Mr. Stevens observed, it is not unexpected that the job openings present at the start of November 2001 were no longer available when Mr. Little called two and a half months later.

Concerning this gap between preparation of the labor market survey and Mr. Little's

telephone inquiries, his counsel asserts that, at best, the employer has only established the existence of suitable alternative employment as of December 3, 2001 when employer's counsel mailed the labor market survey to Mr. Little's attorney. While I have considered the appeal of that argument, I return to the Employer's obligation when presented with a claim of total disability. That is, in the hearing before me, subject to the pre-hearing disclosure requirements, the Employer may produce evidence that suitable alternative employment existed in the local area at the time, or later, when the claimant became unable to perform his usual employment for the Employer. Nothing further is required of the Employer. That is, the Employer did not have to assist Mr. Little in meeting his obligation to diligently search for work when he became unable to continue at BIW. The Employer simply must show suitable work was out in the local area at that time. It was Mr. Little's obligation, and not the Employer's, to go out and find another job for Mr. Little.

In regards to Mr. Little's apparent unsuccessful attempts to obtain work from any of the employers on the direct contact list, I first observe that the labor market survey contained two other sources of job opportunities, the multiple newspaper job ads and the Maine Job Service Listing. The record contains no evidence that Mr. Little made any attempt to pursue those job leads and opportunities and determine whether those jobs were available. Secondly, some of the contacted employers on the list did have job openings, such as Sam's Club (hiring in all positions), MBNA (bill collector), Global Security (part-time work), Best Inn (part-time work), and Motel Six (part-time work). But, for diverse reasons, Mr. Little declined to submit applications with those employers. That type of response leads to a consideration of whether Mr. Little made a diligent effort to obtain work.

In search for re-employment, Mr. Little imposed several qualifications on the type of job that would be acceptable to him. Principally, after leaving BIW, Mr. Little wanted his next job to be in wood harvesting. Due to limited harvesting, Mr. Little had to wait some time prior to seeking a job in that area. He eventually make at least two inquiries and had believed a job in wood harvesting would become available. While Mr. Little's reasons for wanting to harvest wood (air-conditioned cab and good pay) are understandable, in terms of defining his capability to earn a living, his single-mindedness doesn't excuse his failure to seek other types of employment while waiting for the wood harvesting job to develop. In answer to my inquiry on why he didn't look for other work, Mr. Little frankly responded, "I don't know."

Mr. Little also was not interested in working for minimum wage. That's not a viable limitation in this analysis. Mr. Little additionally did not consider jobs in which he had no experience even though the employer offered to provide training. Likewise, that's an artificial limitation. Not only did Mr. Little come to BIW without experience and through training learn the welding trade, he acknowledged that he had little experience in his desired career of wood harvesting. Finally, Mr. Little didn't contact some employers for transportation concerns. Due to financial pressure, Mr. Little couldn't drive his car because it was uninsured. He also was not interested in long commuting distances. However, this criteria was selectively applicable. Mr. Little acknowledged that the potential wood harvesting job was several miles from his home. If he obtained the work harvesting wood, Mr. Little would have bought insurance for his car and driven to the woods. His commuting

concern carries little weight in his case because, while he didn't usually drive, Mr. Little did commute up to an hour to get to his work at BIW. Thus, any job within an hour commute would not necessarily be unreasonable for Mr. Little.<sup>13</sup>

Ultimately, I conclude Mr. Little's limited, and restricted, efforts to find re-employment after leaving his job at BIW do not support a finding that Mr. Little engaged in due diligence in searching for a job, such that his unsuccessful results, and corresponding unemployment, demonstrate suitable alternative employment was not available. In the absence of Mr. Little's diligent search for a job, Mr. Stevens' labor market survey, coupled with statistical data showing a fairly stable local job market with an employment rate below the national average, does establish that suitable alternative employment was available to Mr. Little as of April 10, 2001, when he did not return to BIW due to his disability. As a result, Mr. Little suffered a partial, rather than total loss of wage earning capacity. As of April 10, 2001, the extent of Mr. Little's disability due to odor intolerance was partial.

#### Compensation Determination

Based on the above findings, Mr. Little suffered a temporary, partial disability from April 10, 2001 until May 30, 2001. Under Section 8 (e), 33 U.S.C. § 908(e), Mr. Little's disability compensation shall be two-thirds of the difference between his average weekly wage before his injury and his wage-earning capacity after the injury.<sup>14</sup> According to the parties' stipulation, the average weekly wage in this case is \$572.76.

Because Mr. Little sought benefits for total disability and the Employer has established suitable alternative employment, the earnings associated with that employment demonstrate Mr. Little's wage-earning capacity. *See Berkstresser v. Washington Metro Area Transit Auth.*, 16 BRBS 231, 233 (1984). Mr. Little's counsel asserts the best Mr. Little can achieve is minimum wage. However, the evidence in the record consisting of the labor survey shows a wide range of hourly wages from \$5.75 to \$12.71. In light of Mr. Little's age, education, and work experience, Mr. Stevens was able to narrow that range to a likelihood of \$7.50 to \$8.50 an hour. Based on Mr. Stevens' testimony and my review of Mr. Little's qualifications and the labor market survey, I find Mr. Little's wage earning capacity after leaving BIW was \$7.50 per hour, or a weekly salary of \$300.00. Consequently, Mr. Little's temporary partial disability compensation will be two-thirds the

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<sup>13</sup>Mr. Little also discounted work that might aggravate his newly developed sensitivity to gasoline products. Since numerous jobs were presented in the labor market survey that did not involve such exposure, I have not addressed the extent and reasonableness of that additional self-imposed limitation.

<sup>14</sup>Since Section 8 (e) speaks in terms of "injury" rather than disability, a date of injury determination is usually necessary. For an occupational disease claim, the date of injury is when the claimant became aware of his disease and its association with his employment became apparent. In Mr. Little's case, that date would coincide with Mr. Little's May 1, 2001 visit with Dr. Kern, who confirmed Mr. Little's suspicions that his work at BIW was making him sick. However, because the parties have stipulated to timely notices and the average weekly wage, and Mr. Little only claims disability benefits from the date he was no longer able to work at BIW, I have used April 10, 2001 as the date for establishing residual earning capacity.

difference between the average weekly wage of \$572.76 and his residual earning capacity of \$300.00.

In accordance with Dr. Kern's treatment notes, Mr. Little's disability became permanent on May 31, 2001. Since his permanent partial disability due to his occupational disease is not specifically listed on the scheduled injury list, and he is not a retiree, Mr. Little is entitled to compensation under Section 8 (c) (21), 33 U.S.C. § 908(c) (21). According to that section, Mr. Little's disability compensation will be 66 2/3 per cent of the difference between his average weekly wage and his wage-earning capacity thereafter. In a manner similar to the compensation discussed above for temporary partial disability, Mr. Little's disability compensation for his permanent partial disability will be based on average weekly wage of \$572.76 and residual weekly earning capacity of \$300.00.

#### **Issue No. 4 - Medical Treatment**

Under Section 7 (a) of the Act, 33 U.S.C. § 907 (a), an employer shall furnish all reasonable and necessary medical care and other attendant care or treatment, hospitalization, and medication for a work-related injury. *Pernell v. Capitol Hill Masonry*, 11 BRBS 532, 539 (1979). The term "necessary" relates to whether the medical care is appropriate for the injury. The term "reasonable" addresses the actual cost of treatment. *See Pernell*, 11 BRBS at 539; *see* 20 C.F.R. § 702.402.

Having determined that Mr. Little's odor intolerance with conditioned response was caused by his employment at BIW, the Employer is responsible for past, present, and future medical benefits associated with Mr. Little's disabling ailment. A specific dispute concerning the parameters of such medical care has not been presented to me. However, at a minimum, Mr. Little should be reimbursed for his expenditures associated with his treatment by Dr. Kern and care at the Miles Health Care Center relating to his disability and physical symptoms.

#### **ATTORNEY FEE**

Section 28 of the Act, 33 U.S.C. § 928, permits the recoupment of a claimant's attorney's fees and costs in the event of a "successful prosecution." Since I have determined an issue in favor of Mr. Little, Ms. Cleveland is entitled to consideration of her February 7, 2003 petition to recoup fees and costs associated with her professional work before the Office of Administrative Law Judges in the total amount of \$5,774.14. Mr. Hessert has thirty days from receipt of this Decision and Order to file an objection to Ms. Cleveland's fee petition.

#### **ORDER**

Based on my findings of fact, conclusions of law, and the entire record, I issue the following order. The specific dollar computations of the compensation award shall be administratively performed by the District Director.

1. The Employer, BATH IRON WORKS, **SHALL PAY** the Claimant, MR. WILLIAM J.

LITTLE, compensation for **TEMPORARY, PARTIAL DISABILITY**, from April 10, 2001 through May 30, 2001, based on an average weekly wage of \$572.76, less a residual earning capacity of \$300.00 per week, such compensation to be computed in accordance with Section 8 (e) of the Act, 33 U.S.C. § 908 (e).

2. The Employer, BATH IRON WORKS, **SHALL PAY** the Claimant, MR. WILLIAM J. LITTLE, compensation for **PERMANENT PARTIAL DISABILITY**, from May 31, 2001, and continuing during the duration of the disability, based on an average weekly wage of \$572.76, less a residual earning capacity of \$300.00 per week, such compensation to be computed in accordance with Section 8 (c) (21) of the Act, 33 U.S.C. § 908 (c) (21).

3. The Employer, BATH IRON WORKS, **SHALL FURNISH** the Claimant, MR. WILLIAM J. LITTLE, medical treatment, past, present, and future, as required by his odor intolerance to burnt paint, primer, and associated odors, and corresponding conditioned physical responses, in accordance with Section 7 (a) of the Act, 33 U.S.C. § 907 (a).

**SO ORDERED:**

**A**

RICHARD T. STANSELL-GAMM  
Administrative Law Judge

Date Signed: April 22, 2002  
Washington, D.C.

Attachment No. 1

American Board of Internal Medicine

The Board provides information on certification status as certified and not certified.

**Dr. David Grant Kern**

Certified in Internal Medicine in 1979

Certificate valid indefinitely

General Certificate: Internal Medicine

American Board of Internal Medicine

510 Walnut Street, Suite 1700

Philadelphia, PA 19106

[www.abim.org](http://www.abim.org)

(See also [www.nehealth.org](http://www.nehealth.org) (Select physicians, then internal medicine))